

**STATE OF MICHIGAN  
IN THE SUPREME COURT  
APPEAL FROM THE COURT OF APPEALS**

**VALERIA HALIW and ILKO HALIW,**  
Plaintiffs-Appellants

Supreme Court Docket No. 125022

-vs-

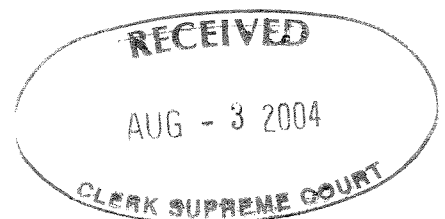
**CITY OF STERLING HEIGHTS,**  
Defendant-Appellee

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**BRIEF ON APPEAL--PLAINTIFFS-APPELLANTS**

**ORAL ARGUMENT REQUESTED**

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## TABLE OF CONTENTS

Table of Contents .....	i
Index of Authorities .....	iii
Judgment Being Appealed and Relief Sought .....	1
Question Presented For Review .....	2
Statement of Facts .....	3
Standard of Review .....	7
Argument .....	8
I.    THE 1997 CHANGES TO MCR 2.403(O) WERE ONLY INTENDED TO INCLUDE CASE EVALUATION SANCTIONS WHERE A PARTY PREVAILS ON A MOTION, AS WELL AS AT TRIAL, AND NOT TO ADDRESS WHETHER APPELLATE FEES AND COSTS ARE ASSESSABLE AS MEDIATION SANCTIONS .....	8
A. <u>MCR 2.403 does not specifically provide for appellate fees, so they should not               be inferred</u> .....	8
1.    The plain language of MCR 2.403(O) does not provide for appellate fees .....	8
2.    The appellate attorney fees in the instant case were not “necessitated by” the rejection of the case evaluation award .....	11
3.    MCR 2.403 has consistently been interpreted as providing for attorney fees incurred only at the trial level. The 1997 Amendments did not, <i>sub                   silentio</i> , overrule the holdings or logic of these cases. ....	14
B. <u>The Supreme Court had no intention to include appellate fees in MCR               2.403(O)</u> .....	21
1.    The Committee which amended MCR 2.403 only included trial judges and practitioners and did not include any members of the appellate bar	

	or the appellate judiciary .....	21
2.	Under the appellate court's holding, the appellate division apparently has no role in assessing costs and attorney fees incurred at the appellate level .....	23
3.	The minor changes in the 1997 Amendments to MCR 2.403 were not meant to result in sweeping changes. The Court of Appeals broke with interpretations of previous changes in the Rule, which were also mostly minor .....	25
4.	MCR 2.403 applies only to civil actions, which originate in the trial court, and not appellate proceedings, as appellate courts do not have jurisdiction over civil actions .....	25
II	IMPOSING APPELLATE FEES AS A PUNITIVE SANCTION FOR REJECTING CASE EVALUATION WILL CREATE A CHILLING EFFECT ON FUTURE LITIGANTS, SEVERELY DETERRING THE EXERCISE OF THEIR STATUTORY RIGHT TO APPEAL .....	28
	Conclusion and Relief Requested .....	32

## **INDEX OF AUTHORITIES**

### **STATUTES**

Michigan Compiled Laws § 600.2445 .....	14
Michigan Compiled Laws § 600.6306 (1) .....	20
Michigan Compiled Laws § 600.6308 .....	26
Michigan Compiled Laws § 691.1401 <i>et seq</i> .....	3

### **COURT RULES**

Michigan Court Rule 1.103 .....	27
Michigan Court Rule 2.001 .....	26, 28
Michigan Court Rule 2.101 .....	26
Michigan Court Rule 2.116 .....	3, 19
Michigan Court Rule 2.403 (A) .....	26
Michigan Court Rule 2.403 (O) .....	<i>Passim</i>
Michigan Court Rule 2.610 .....	19
Michigan Court Rule 2.611 .....	19
Michigan Court Rule 7.203 (A) .....	26
Michigan Court Rule 7.208 (A) .....	24
Michigan Court Rules 7.213 (A) .....	28
Michigan Court Rules 7.213 (A) (1) .....	28
Michigan Court Rule 7.213 (A) (6) .....	24
Michigan Court Rule 7.216 (A) (7) .....	24

Michigan Court Rule 7.216 (C) .....	10,14, 24
Michigan Court Rule 7.318 (B) .....	28

## **CASES**

<i>American Casualty Co. v Costello</i> 174 Mich App 1; 435 N.W.2d 760 (1989) .....	15
<i>Amlotte v. United States</i> 292 F. Supp. 2d 922 (E.D. Mi. 2003) .....	20
<i>Ass'n of County Clerks v. Lapeer Circuit Judges</i> 465 Mich. 559; 640 N.W.2d 567 (2002) .....	7
<i>Attard v. Citizens Ins. Co. of Am.</i> 237 Mich. App. 311; 602 N.W.2d 633 (1999) .....	17
<i>Ayre v. Outlaw Decoys, Inc.</i> 256 Mich. App. 517; 664 N.W.2d 263 (2003) .....	13, 31
<i>Campbell v. Sullins</i> 257 Mich. App. 179, 200; 667 N.W.2d 887 (2003) .....	17
<i>Clute v General Accident Assurance Co of Canada</i> 177 Mich App 411; 442 NW2d 689 (1989) .....	17
<i>Dewald v. Isola</i> 188 Mich. App. 697; 470 N.W.2d 505 (1991) .....	14
<i>Estate of Miller</i> 359 Mich. 167; 101 N.W.2d 381 (1960) .....	17
<i>Fisher v. Detroit Free Press, Inc.</i> 158 Mich App 409; 404 N.W.2d 765 (1987) .....	15
<i>Franges v. General Motors Corp.</i> 404 Mich 590; 274 N.W.2d 392 (1979) .....	13
<i>Gianetti Bros Construction Co. v Pontiac</i> 175 Mich App 442; 438 N.W.2d 313 (1989) .....	15

<i>Haliw v. Sterling Heights</i> 464 Mich. 297; 627 N.W.2d 581 (2001) .....	4
<i>Haliw v. Sterling Heights</i> Mich App No. 237269 (2003) .....	8, 10, 14, 16, 22
<i>Haliw v. Sterling Heights</i> Mich App No. 237269 (2004) (White, J. dissenting) .....	15, 17, 18
<i>Keiser v Allstate Ins. Co.</i> 195 Mich App 369; 491 N.W.2d 581 (1992) .....	16
<i>Leavitt v. Monaco Coach Corp.</i> 241 Mich App 288; 616 N.W.2d 175 (2000) .....	15
<i>Maple Hill Apartment Co. v. Robert W. Stine, A.I.A.</i> 147 Mich. App. 687; 382 N.W.2d 849 (1985) (MacKenzie, J. concurring and dissenting in part) .....	13
<i>Marshall v. Wabash R. Co.</i> 201 Mich. 167, 172; 167 N.W. 19 (1918) .....	24
<i>Matras v. Amoco Oil Co.</i> 424 Mich. 675; 385 N.W.2d 586 (1986) .....	10
<i>McAuley v General Motors Corp.</i> 457 Mich. 513; 578 N.W.2d 282 (1998) .....	9, 10, 19
<i>McAuley v General Motors Corp.</i> 457 Mich. 513; 578 N.W.2d 282 (1998) (Taylor J. concurring in part and dissenting in part)	10
<i>Meagher v. Wayne State University</i> 222 Mich. App. 700; 565 N.W.2d 401 (1997) .....	15
<i>Michigan Basic Property Ins. Ass'n v. Hackert Furniture Distributing Company, Inc.</i> 194 Mich. App. 230; 486 N.W. 68 (1992) .....	12, 13
<i>Mills v. Electric Auto-Lite Co.</i> 396 U.S. 375 (1970) .....	11

<i>People v. Borchard-Ruhland</i> 460 Mich. 278; 597 N.W.2d 1 (1999) .....	13
<i>Put v. FKI Indus.</i> 222 Mich. App. 565, 572; 564 N.W.2d 184 (1997) .....	20
<i>Rafferty v. Markovitz</i> 461 Mich. 265; 602 N.W.2d 367 (1999) .....	9, 19
<i>Severn v. Sperry Corp.</i> 212 Mich. App. 406; 538 N.W.2d 50 (1995)(Jansen, J., dissenting in part) .....	12
<i>Smith v. Elenges</i> 156 Mich. App. 260; 401 N.W.2d 342 (1986) .....	27
<i>Smith v. Henry Ford Hospital</i> 219 Mich. App. 555, 558; 557 N.W.2d 154 (1996) .....	13
<i>Warren v. Pickering</i> 192 Mich App 153; 480 N.W.2d 306 (1991) .....	20
<i>Zalut v. Andersen &amp; Assoc., Inc.</i> 186 Mich. App. 229; 463 N.W.2d 236 (1990) .....	25
<b><u>MISCELLANEOUS AUTHORITIES</u></b>	
WILLIAM SHAKESPEARE, HAMLET, Act I, Scene ii .....	31
WILLIAM SHAKESPEARE, HAMLET, Act I, Scene iv .....	12
Michigan Compiled Laws, § 2.403, Staff Comments (1997) .....	21
Michigan Compiled Laws, § 2.403, Staff Comments (2000) .....	3, 22
Michigan Compiled Laws, § 2.403, Staff Comments (2000) (Kelly, J., dissenting) ....	23, 32
Special Orders, Mediation Rule Committee, MCR 2.403 (O) 451 Mich. 1205 (1995) .....	18, 21
DEAN AND LONGHOFFER, MICHIGAN COURT RULES PRACTICE, § 2403.22 .....	27

**JUDGMENT OR ORDER BEING APPEALED AND RELIEF SOUGHT**

The Court of Appeals found in favor of the Defendant-Appellee. The Court's opinion is cited in Plaintiffs-Appellants' Appendix, pp. 31a-44a. The decision of the Court of Appeals, however, should be reversed. Plaintiffs-Appellants request that this Court hold that appellate attorney fees are not recoverable under MCR 2.403 (O). Plaintiffs-Appellants further request that this Court hold that only fees incurred at the trial level that were necessitated by rejection of case evaluation is an appropriate sanction.

**QUESTION PRESENTED FOR REVIEW**

1. Are appellate fees and costs recoverable as case evaluation sanctions under MCR 2.403 (O)?

Plaintiffs-Appellants contend that the answer is “NO.”

Defendant-Appellee contend that the answer is “YES.”

## **STATEMENT OF FACTS**

Plaintiff Valeria Haliw (*hereinafter* “Plaintiff”) slipped and fell on an icy sidewalk in Defendant City of Sterling Heights on January 29, 1996. As a result of her fall, Plaintiff sustained severe bruises to her abdomen and side, injury to her hip and elbow and a severe bimalleolar fracture to the left ankle for which she required the insertion of a metal plate and seven metal screws. After the fall, Plaintiff underwent surgery and physical therapy with her mobility and ability to ambulate being severely affected. Plaintiff also suffered depression from the impact these injuries have had on her daily living.

An action for negligence was filed in the Macomb County Circuit Court under the “highway exception” to governmental immunity statute, MCL 691.1401 *et seq.*, on the contention that the sidewalk was defective and not maintained in reasonable repair. Plaintiff contended that the sidewalk was defective and conditions existed which rendered the sidewalk defective and hazardous under Defendant’s own written sidewalk policy.

After extensive discovery, this case was mediated on September 15, 1997 and a unanimous mediation panel entered a mediation award of \$55,000 in favor of Plaintiff.<sup>1</sup> Both the Defendant and the Plaintiff rejected the mediation award. Prior to rejecting the mediation award, Defendant filed a Motion for summary disposition in the Trial Court pursuant to MCR 2.116(C)(7) and (10), arguing that Plaintiff’s claims were barred by the “natural accumulation doctrine.” The Trial Court denied Defendant’s motion ruling that there were questions of fact regarding whether the natural accumulation

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<sup>1</sup> Case evaluation sanctions are synonymous with the former term, mediation sanctions, and either reference should be considered as substantively the same thing. *See Mich. Ct. R. 2.403, Staff Comment (2000).*

doctrine applied and whether the sidewalk was defective.

Defendant then applied for leave to appeal to the Court of Appeals. In an unpublished *per curiam* opinion released October 15, 1999, a unanimous Court of Appeals affirmed the Macomb County Circuit Court's ruling denying Defendant's Motion for Summary Disposition, finding that a genuine issue of material fact existed as to whether there was a defect in the condition of the sidewalk.

After adverse rulings from the case evaluation panel, the Trial Court and the Court of Appeals, Defendant then appealed to this Court on the legal issue of the proper application of the natural accumulation doctrine. There was never a dispute as to whether Plaintiff was in fact seriously injured, but Defendant pursued clarification of the legal issue, for which all municipalities would benefit, of when the natural accumulation doctrine would shield a municipality from liability.

This Court granted leave and reversed the findings of the Trial Court and the Court of Appeals in a split decision, and held that under the natural accumulation doctrine, Plaintiff could not prevail against Defendant.<sup>2</sup> This Court remanded the case to the Trial Court for entry of an order granting Defendant's Motion for summary disposition.

On remand, Defendant moved for entry of an order granting it summary disposition and for its costs and attorney fees pursuant to MCR 2.403 (O). Defendant requested mediation sanctions in the amount of \$31,618, which included its appellate attorney fees. The Trial Court entered an order granting Defendant summary disposition, but agreed with Plaintiff that MCR 2.403(O) did not provide for payment of Defendant's appellate attorney fees. Because the Trial Court could not segregate

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<sup>2</sup> *Haliw v. Sterling Heights*, 464 Mich. 297; 627 N.W.2d 581 (2001).

Defendant's trial court costs and attorney fees from its appellate costs and attorney fees, the Trial Court requested that Defendant do so and re-submit a bill of costs.<sup>3</sup> Thereafter, Defendant presented a supplemental motion for mediation sanctions in the amount of \$5,335 for its Trial Court expenses. At the hearing on Defendant's supplemental motion, the Trial Court recognized it had the discretion not to award costs or attorney fees, but noted that there were two sides to the case and that Defendant had incurred expenses. The Trial Court further reasoned that because Plaintiff's claim was not frivolous and because the appellate ruling established legal precedent *benefitting* Defendant, it would award defendant \$1,500 as a case evaluation sanction.<sup>4</sup>

Defendant then appealed by right the Trial Court's Order granting case evaluation sanctions to the Michigan Court of Appeals, arguing that although the Trial Court granted its motion, the Trial Court improperly excluded its appellate attorney fees. Defendant asserted that the plain language of MCR 2.403 (O) allows a litigant that ultimately obtains a verdict more favorable than a rejected mediation (case evaluation) be awarded its reasonable attorney fees without any distinction between fees incurred in the Trial Court and those incurred for appellate advocacy. Plaintiff's cross appeal argued that the Trial Court abused its discretion by not invoking the interest of justice exception of MCR 2.403 (O) (11) in refusing to award defendant any of its attorney fees. The Michigan Court of Appeals, in a split decision, issued its opinion on August 5, 2003, holding that "actual costs" within the meaning of MCR 2.403(O) includes reasonable appellate attorney fees necessary to obtain a favorable verdict after

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<sup>3</sup> See Plaintiffs-Appellants' Appendix, pp. 17a-22a.

<sup>4</sup> See Plaintiffs-Appellants' Appendix, pp. 23a-28a; Plaintiffs-Appellants' Appendix, pp. 29a-30a.

rejection of a case evaluation.<sup>5</sup> Plaintiff then filed a timely motion for reconsideration, which was denied by the Michigan Court of Appeals by order entered on October 6, 2003.<sup>6</sup> On June 3, 2004, this Court then granted leave to appeal on the sole issue of whether appellate attorney fees are recoverable as a case evaluation sanction under MCR 2.403 (O).<sup>7</sup>

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<sup>5</sup> See Plaintiffs-Appellants' Appendix, pp. 31a-44a.

<sup>6</sup> See Plaintiffs-Appellants' Appendix, pp. 45a-46a.

<sup>7</sup> See Plaintiffs-Appellants' Appendix, pp. 47a-48a.

## **STANDARD OF REVIEW**

Interpretation of Court Rules are issues the Michigan Supreme Court reviews de novo.<sup>8</sup>

## II. ARGUMENT

### I THE 1997 CHANGES TO MCR 2.403(O) WERE ONLY INTENDED TO INCLUDE CASE EVALUATION SANCTIONS WHERE A PARTY PREVAILS ON A MOTION, AS WELL AS AT TRIAL, AND NOT TO ADDRESS WHETHER APPELLATE FEES AND COSTS ARE ASSESSABLE AS MEDIATION SANCTIONS.

#### A. MCR 2.403 does not specifically provide for appellate fees, so they should not be inferred.

##### **1. The plain language of MCR 2.403(O) does not provide for appellate fees.**

Justice White in the Court of Appeals had it right: nothing in MCR 2.403 (O) provides for the conclusion that appellate fees may be recovered as a sanction for rejecting a case evaluation award. The majority judges in the Court of Appeals decision started its opinion by making the following concession: “We begin by noting that as a general rule, attorneys’ fees are not recoverable either as an element of costs or damages unless allowance of a fee is expressly authorized by statute or court rule.”<sup>9</sup> The Court of Appeals further conceded that the Michigan Court Rules do not specifically provide for attorney fees as a sanction for the rejection of case evaluation at the appellate level: “The *plain language* of the rule neither expressly allows nor disallows ‘appellate’ attorney fees. The only qualifications regarding attorney fees are that a trial judge determine that attorneys’ fees are recoverable, and they were ‘necessitated by the rejection’ of the case evaluation.”<sup>10</sup>

Then, however, the Court of Appeals ignored the general rule and began to engage in an

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<sup>9</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p. 4 (2003).

<sup>10</sup> *Id.* (emphasis added).

examination of the Court Rule, attempting to divine an intent from words that simply are not there. The “rule” of statutory construction on which the Court based this expedition was this: Since the language didn’t expressly state appellate fees were not recoverable, it had license to engage in construction of the Rule to see if fees might be recoverable. This, however, is the exact *opposite* of the general rule: “[A]ttorneys fees generally are not recoverable . . . in the absence of a statute or a court rule that expressly authorizes such an award.”<sup>11</sup>

The Court of Appeals also held that since the attorney fees provided for in MCR 2.403 were based on different policy reasons than the appellate fees explicitly provided for in Chapter 7, the fees provided in Chapter 7 could not serve as the basis for denying appellate fees in Chapter 2. This argument was rejected by this Court in *McAuley v General Motors Corp* and then specifically overruled in *Rafferty v. Markovitz*.

In *McAuley*, this Court held that mediation sanctions were not available to a party when he was already compensated for his attorney fees under the Michigan Handicappers Civil Rights Act (HCRA). The Court relied on (indeed, began its analysis) the fact that a Court Rule did not expressly provide for duplicative attorney fees. Therefore, the party seeking attorney fees was not entitled to the fees provided for in MCR 2.403.<sup>12</sup> Specifically, the Court rejected the argument (as made by the Court of Appeals in *Haliw*) that since the HCRA and the mediation sanctions of MCR 2.403 served different

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<sup>11</sup> *Rafferty v. Markovitz*, 461 Mich. 265, 270; 602 N.W.2d 367 (1999) (*relying on* *McAuley v General Motors Corp*, 457 Mich. 513; 578 N.W.2d 282 (1998)).

<sup>12</sup> This Court left open the possibility that under certain circumstances one may recover duplicatively under separate Court Rules or statutes that serve independent purposes. This dicta was specifically overruled in *Rafferty*, 461 Mich. at 272-73 & n. 6.

policy reasons, the intent of the drafters was to provide for duplicative fees. The Court further reasoned that the Court Rule did not expressly provide for a double recovery. Therefore, even under an “independent purpose” analysis, the double recovery was not justified.<sup>13</sup> This Court therefore honored the rule of law and *stare decisis*, which has held that unless attorney fees are specifically provided for, one is not entitled to them.

Nevertheless, the Court of Appeals reasoned that since “MCR 7.216 (C) and MCR 2.403 (O) serve different purposes” recovery under MCR 7.216 (C) is not the sole remedy for a party seeking appellate attorney fees.<sup>14</sup> In *Rafferty*, this Court dropped the other shoe: “[W]e repudiate the dicta in *McAuley* that left open the possibility of recovering attorney fees under both a court rule and a statute where each attorney-fee provision serves an independent purpose.”<sup>15</sup>

These cases reaffirmed the principle that is nearly as old as this Republic itself: Appellate attorney fees are not awardable as case evaluation sanctions under the “American Rule.” The American Rule provides that attorney fees are only available if expressly provided for by statute or court rule.<sup>16</sup>

The majority’s opinion in the Court of Appeals seems to be at odds with what is termed the “American

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<sup>13</sup> See *McAuley*, 457 Mich. at 522 (Under MCR 2.403 (O), “there was no authority in the language of the rule for the trial court to enter an order compelling the rejecting party to pay attorney fees a second time.”); *accord on the same principle* *Matras v. Amoco Oil Co.*, 424 Mich. 675, 695; 385 N.W.2d 586 (1986) (“Attorney fees ordinarily are not recoverable at common law, but may be recoverable where a statute specifically so provides.”)

<sup>14</sup> *Haliw*, Mich App No. 237269, p. 8 (2003).

<sup>15</sup> *Rafferty*, 461 Mich. at 272-73 & n. 6 (*adopting* *McAuley*, 457 Mich. 526-29 (Taylor J. concurring in part and dissenting in part).

<sup>16</sup> See *McAuley*, 457 Mich. at 519.

Rule,” which has been the rule of law in virtually every State of this Union to the extent a statute or court rule does not provide an exception.<sup>17</sup> The Court of Appeals does not sit to correct policy choices of the Michigan Legislature, the Michigan Supreme Court, or Congress. Plainly, since appellate attorney fees are not expressly provided for in MCR 2.403, they should not be available as sanctions under MCR 2.403. Accordingly, this Court should reverse the decision of the Court of Appeals and affirm the judgment of the Trial Court, which already determined the appropriate amount of case evaluation sanctions.

**2. The appellate attorney fees in the instant case were not “necessitated by” the rejection of the case evaluation award.**

The instant case was not appealed because of Plaintiff’s rejection of the case evaluation award. Defendant, regardless of Plaintiff’s acceptance or rejection of the case evaluation award, had planned to appeal any trial court ruling regarding the interpretation of the natural accumulation doctrine, which was adverse to the City’s interests. Therefore, *Defendant* chose to appeal — not Plaintiff. Defendant’s attorney time records show that the Defendant City had embarked on the appellate process prior to receipt of notice of Plaintiff’s rejection of mediation, which the Defendant City had already rejected itself. The Defendant City does not deny that it had planned to attack the interpretation of the Natural Accumulation Doctrine under then current case law, and was prepared to appeal this case to the Michigan Supreme Court if it lost its Motion for summary disposition and its appeal to the Michigan Court of Appeals.<sup>18</sup> Therefore, the fees incurred by the City were “necessitated by” its own zeal to

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<sup>17</sup> See *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970).

<sup>18</sup> See Plaintiffs-Appellant’s Appendix, pp. 55a, 59a, 60a.

appeal and overrule the natural accumulation doctrine. Essentially, this case was going to be appealed no matter what Plaintiff did.

Further, Plaintiff had strong equities in rejecting case evaluation. Plaintiff had an implicit right to rely on *stare decisis*; that the Trial Court would properly apply the correct rule of law. The appeals regarding the application of the natural accumulation doctrine were further “necessitated by” the Trial Court’s (and the Court of Appeals’) error in application of the law on the doctrine. The Trial Court’s erroneous ruling of law on Defendant’s Motion for summary disposition led to Defendant’s subsequent appeals on that issue. At the end of the day, the Plaintiff is stuck with the bill for the errors of the Trial Court and Court of Appeals.<sup>19</sup> If this is the way this State assigns costs to litigants, then truly “something is rotten in the State of Denmark.”<sup>20</sup>

“Necessitated by” should be interpreted in its normal sense, cause and effect. The Court of Appeals, however, apparently held that “necessitated by” doesn’t have any legal teeth. Essentially, the Court of Appeals held that the Supreme Court, in drafting this language, endorsed a *post hoc ergo propter hoc* attitude. Cause and effect means nothing — “necessitated by” really only means “followed by.” This, of course, is at odds with how the Michigan judiciary interprets language:

The task of discerning our Legislature’s intent begins by examining the language of the statute itself. Where the language of the statute is *unambiguous*, the *plain meaning*

<sup>19</sup> Cf. *Severn v. Sperry Corp.*, 212 Mich. App. 406, 420; 538 N.W.2d 50 (1995) (Jansen, J., dissenting in part) (“The second trial was not necessitated by rejection of the mediation evaluation; rather, it was necessitated by an error in the proceedings of the first trial.”); *Michigan Basic Property Ins. Ass’n v. Hackert Furniture Distributing Company, Inc.*, 194 Mich. App. 230, 235-236; 486 N.W. 68 (1992) (holding that a party should not be forced to pay for litigation services through no fault of its own).

<sup>20</sup> WILLIAM SHAKESPEARE, *HAMLET*, Act I, Scene iv.

reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is *not permitted*. Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to determine legislative intent. When construing a statute, the court must presume that every word has some meaning and should avoid any construction that would render any part of the statute surplusage or nugatory. If possible, effect should be given to each provision.<sup>21</sup>

The interpretation of statutes should be done so as to prevent absurd results, injustice, or prejudice to the public interest.<sup>22</sup> The Court of Appeals' construction does not survive this Court's pronouncement on statutory construction.<sup>23</sup> The line of decisions on which the Court of Appeals relies do *not* hold that causation is irrelevant. Those cases cited by the Court of Appeals held that "necessitated by," to the extent it is a temporal demarcation, was only meant "to permit recovery of reasonable attorney fees incurred after mediation (case evaluation) is rejected, not before."<sup>24</sup> Such a construction is implied by the natural meaning of "necessitated by." "MCR 2.403(O)(6) clearly requires that a *causal nexus* be established between the services performed by the attorney and the particular party's rejection of the case evaluation."<sup>25</sup> The Court of Appeals gave no legal, policy, or even intuitive

<sup>21</sup> *People v. Borchard-Ruhland*, 460 Mich. 278, 284-85; 597 N.W.2d 1 (1999) (internal citations omitted) (emphasis added).

<sup>22</sup> *See Franges v. General Motors Corp.*, 404 Mich 590, 612; 274 N.W.2d 392 (1979).

<sup>23</sup> The rules used to interpret statutes also govern the construction of court rules. *See Smith v. Henry Ford Hospital*, 219 Mich. App. 555, 558; 557 N.W.2d 392 (1979).

<sup>24</sup> *Michigan Basic Property Ins. Ass'n*, 194 Mich. App. at 235-36 (emphasis added), *relying on and adopting* *Maple Hill Apartment Co. v. Robert W. Stine, A.I.A.*, 147 Mich. App. 687, 695-96; 382 N.W.2d 849 (1985) (MacKenzie, J. concurring and dissenting in part) ("I believe that the sanction imposed by the general court rule is that the rejecting party is responsible for reasonable attorney fees incurred by the opposing party which are the result of services rendered after mediation is rejected, but not those performed up to the time mediation is rejected. This construction is borne out by the Committee Notes accompanying GCR 1963, 316.").

<sup>25</sup> *Ayre v. Outlaw Decoys, Inc.*, 256 Mich. App. 517, 526; 664 N.W.2d 263 (2003) (emphasis added).

argument why this should not be the case. Accordingly, this Court should reverse the decision of the Court of Appeals and affirm the Trial Court's judgment on the amount of case evaluation sanctions awarded to Defendant.

**3. MCR 2.403 has consistently been interpreted as providing for attorney fees incurred only at the trial level. The 1997 Amendments did not, *sub silentio*, overrule the holdings or logic of these cases.**

Sanctions under MCR 2.403 (O) have never provided for appellate attorney fees. The Court of Appeals, however, held that appellate attorney fees are recoverable when Court Rules are ambiguous, as if this were always the law in this State. Nowhere in the Court of Appeals' opinion does it cite authority from this Court for that position. In fact, the only authorities upon which the Court of Appeals purported to rely were cases within the appellate division interpreting statutes of the State of Michigan and Congress — but certainly not MCR 2.403.<sup>26</sup> Plainly, the Court of Appeals is missing its assumption that attorney fees are recoverable when a statute or Court Rule doesn't explicitly exclude them — namely, any on point case law.

The Court of Appeals omitted the substance of *Dewald v. Isola*<sup>27</sup> from its discussion of sanctions under statutes. Interpreting MCL 600.2445, the Court therein held that since the language of the statute was silent on appellate attorney fees and since MCR 7.216 (C) specifically provides for appellate attorney fees on appeal, the Court would not award appellate fees pursuant to the statute.<sup>28</sup>

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<sup>26</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p. 5 (2003).

<sup>27</sup> 188 Mich. App. 697; 470 N.W.2d 505 (1991).

<sup>28</sup> *Dewald*, 188 Mich. App. at 699-700, 703-04. The Court of Appeals in *Haliw* ironically stated that Appellant's reliance on *Dewald* was off point since that case did not interpret MCR 2.403 (O). The

Indeed, several Court of Appeals cases held that MCR 2.403 specifically did not include mediation sanctions at the appellate level.<sup>29</sup> In *American Casualty Co. v Costello*, the Court of Appeals held:

Defendants argue that mediation sanctions apply to appellate activities. We disagree. We believe that the mediation sanctions provided for in MCR 2.403(O) are only intended to apply through final judgment *at the trial court level*. The trial court in this case has awarded actual expenses for trial activities as a mediation sanction pursuant to MCR 2.403(O). Sanctions for appellate expenses are *specifically set forth in MCR 7.216(C)*. Said rule does not provide for mediation sanctions for appellate activities<sup>30</sup>

Also, in *Meagher v. Wayne State University*,<sup>31</sup> the Court of Appeals held that a party need not await appellate resolution before applying for and receiving sanctions from the trial court: “The trial court is not required to await the outcome of an appeal before determining the prevailing party.”<sup>32</sup> It would make little sense (indeed, it would be impossible) to allow the trial court to determine case evaluation sanctions *before* the appeals process ended if appellate fees were to be included within that

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Court of Appeals, however, relied on *six* cases where *it* analogized statutes to MCR 2.403 (O). Further, the Court never addressed *Dewald* on the merits; rather it merely said it was not bound to follow it.

<sup>29</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p 1 (2003) (White. J., dissenting) (“MCR 2.403 consistently has been interpreted as providing for attorney fees incurred at the trial level only, and as not providing for attorney fees incurred on appeal.”).

<sup>30</sup> 174 Mich. App. 1, 13; 435 N.W.2d 760 (1989) (emphasis added). *Accord*, *Leavitt v. Monaco Coach Corp.*, 241 Mich. App. 288, 312 & n.4; 616 N.W.2d 175 (2000); *Gianetti Bros Construction Co. v Pontiac*, 175 Mich. App. 442, 447; 438 N.W.2d 313 (1989) (“While we are not bound by decisions rendered by other panels of this Court, we are persuaded that *American Casualty* represents the correct view. Postjudgment appellate attorney fees do not fall within the realm of mediation sanctions awardable under the court rules.”); *See generally* *Fisher v. Detroit Free Press, Inc.*, 158 Mich. App. 409, 416-419; 404 N.W.2d 765 (1987).

<sup>31</sup> 222 Mich. App. 700; 565 N.W.2d 401 (1997).

<sup>32</sup> *Meagher*, 222 Mich. App. at 729.

determination.

Faced with this prior authority, the Court of Appeals argued that this logic was defective simply because it was not bound to follow it. Second, the Court of Appeals disagreed with what it *interpreted* as the reasoning of these cases — because appellate attorney fees may be obtained in Chapter 7 of the Michigan Court Rules, appellate attorney fees cannot be obtained in Chapter 2.<sup>33</sup> The Court of Appeals then held that the 1997 Amendments changed everything, and that it was the will of this Court in drafting the changes that the line of reasoning in *American Casualty* and its progeny was overruled. Plaintiff respectfully disagrees.

In 1997, this Court changed the language of MCR 2.403 (O) from an action proceeding to “trial” to an action that proceeds to “verdict.” Verdict is defined as: jury verdict; judgment by the court after a nonjury trial; or a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.<sup>34</sup> Based on this, the Court of Appeals held that appellate fees were recoverable as a case evaluation sanction.<sup>35</sup>

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<sup>33</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p. 7 (2003). The Court reading did not represent a fair interpretation of the holding of *American Casualty*. The argument that Article 7 specifically provides for attorneys fees is *sui generis*. If anything, *American Casualty* accepted and followed the reasonable and broad principle that unless specifically provided for by statute or by rule, attorney fees may not be had. *See supra* I A 1. Or, the Court therein held that the Court Rules created separate and distinct rules for each level of the judiciary, further holding that appellate attorney fees, were they to be had anywhere, must be found in Chapter 7. *See infra* I B 4.

<sup>34</sup> *See* Mich. Ct. R. 2.403 (O) (2). *See infra* for Plaintiff’s argument regarding the changes to MCR 2.403 (O) (2) (c).

<sup>35</sup> The two majority judges in *Haliw*, Mich App No. 237269, relied on *Keiser v Allstate Ins. Co.*, 195 Mich App 369; 491 N.W.2d 581 (1992) for the proposition that “verdict” means “ultimate verdict,” i.e., any decision rendered on appeal thereafter was to be included as mediation sanctions. This is not a fair reading of *Keiser*. That case *also* held: “[S]anctions for appellate expenses are expressly set forth in MCR 7.216(C), which does not provide for mediation sanctions.” *Keiser*, 195 Mich.

First, the 1997 changes relied on by the majority “were not intended to address the issue whether appellate fees and costs are assessable as mediation sanctions. Rather the changes were addressed at making mediation sanction available where a party prevails on motion, rather than at trial.”<sup>36</sup> Plaintiff contends that this is the more logical reading of the changes. The “motion” to which the Court Rule refers is a motion for judgment notwithstanding the verdict, a motion for direct verdict, or a motion for summary disposition — but not any and all *appeals* relating to that motion. The 1997 changes were meant to clarify (or even alter) that a trial is not necessary to *trigger* case evaluation sanctions. A pre or post-trial motion may also trigger sanctions — but only to the extent these motions were made in the trial court.<sup>37</sup> Again, the change was not meant to address all appeals of the motion.<sup>38</sup>

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App. at 374.

*Keiser*, to the extent it modified *American Casualty* or *Clute v General Accident Assurance Co of Canada*, 177 Mich App 411; 442 NW2d 689 (1989), only modified it to the extent those cases addressed costs for pre or post-trial motions. Defendant does not seek fees for pre or post trial motions. Thus, *Keiser* does not apply. See also *Haliw v. Sterling Heights*, Mich. App. No. 237269, p. 1 & n. 1 (2003) (White, J., dissenting).

<sup>36</sup> *Haliw*, Mich. App. No. 237269, p. 2 (2004) (White, J., dissenting). Judge White further added that “I would not read the changes as evidencing an intent by the Supreme Court to modify the construction previously given the rule with respect to appellate attorney fees being appropriately included as an element of mediation sanction.” *Id.* The logic of Judge White’s intuition is fleshed out *infra* in this Brief (I B 1-4).

<sup>37</sup> See *Attard v. Citizens Ins. Co. of Am.*, 237 Mich. App. 311, 329; 602 N.W.2d 633 (1999) (The purpose of the mediation rule is “to place the burden of litigation costs on the party that necessitates the *conducting of a trial* by rejecting a proposed mediation award.”) (emphasis added). *Accord*, *Campbell v. Sullins*, 257 Mich. App. 179, 200; 667 N.W.2d 887 (2003).

<sup>38</sup> This is intuitive, given the layout of Article 2. See, e.g., Mich. Ct. R. 2.403 (O) (4) (a-c). See also *infra* I B 4. Cf. *Estate of Miller*, 359 Mich. 167, 172; 101 N.W.2d 381 (1960) (“[O]ne section of a statute must be considered in relation to other sections in the same statute in order to determine legislative intent, especially where specific references from such section to other portions are included. The same construction would properly apply to our Court Rules.”) Article 2 deals with the trial courts’ jurisdiction, which does not include appeals or appellate fees.

Second, in 1997, the language which defined “verdict” changed from “a judgment entered as a result of a ruling on a motion filed after mediation” to “a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation.” The whole point of making this change was due to the fact that sometimes cases are submitted to case evaluation before rulings on dispositive motions. “[I]n general, rulings on dispositive motions should precede mediation.”<sup>39</sup> As such, a case evaluation may be held while a motion for summary disposition is pending. “This can distort the mediation process, as the mediators’ evaluation may be affected by the knowledge that a dispositive motion is pending or is likely to be filed. That is, they may take into account the likelihood of the defendant winning on a motion in evaluating the case.”<sup>40</sup> The Committee, therefore, was solely thinking about conduct occurring in the trial court, and affecting a process uniquely serving the trial court, i.e., case evaluation. Plaintiff argues that the Supreme Court would not adopt the language suggested by the Committee, and then impart an entirely different meaning than the one the Committee had. The Committee’s thinking and recommendation is certainly not binding on courts — but is informative and generally considered. Judge White was not persuaded that the changes to MCR 2.403 (O) should be regarded “as evidencing an intent by the Supreme Court to modify the construction previously given the rule with respect to appellate attorney fees being appropriately included as an element of mediation sanction.”<sup>41</sup> Plaintiffs urge this Court to agree.

The inter-play of other subsections of MCR 2.403 (O) would not be consistent with the Court

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<sup>39</sup> Special Orders, Mediation Rule Committee, MCR 2.403 (O), 451 Mich. 1205, 1223 (1995)

<sup>40</sup> *Id.*

<sup>41</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p. 2 (2003) (White, J., dissenting).

of Appeals' holding. Namely, the Court of Appeals did not address MCR 2.403 (O) (8) and its implications. That section reads: "A request for costs under this subrule must be filed and served within *28 days after the entry of the judgment* or entry of an order denying a timely motion for a new trial or to set aside the judgment." (Emphasis added). One only has 28 days after the denial of a motion for a new trial, a motion to set aside, or the entry of the judgment to file for case evaluation sanction. The context of this language, therefore, is striking. The first two motions, by definition, are hearings that can only be held in the trial court.<sup>42</sup> To the extent a motion for summary disposition is defined by the Court Rules as a "verdict," that motion, too, is heard and decided only by the trial court.<sup>43</sup> Any of the above motions *may* be heard on appeal, but to argue that MCR 2.403 (O) was "written" to include appellate fees incurred on those motions, *sub silentio*, is, in Plaintiff's opinion, too much of a reach. Taking the Court of Appeals' argument to its logical extension, appellate review of judgments notwithstanding the verdict and directed verdicts, too, would be within the ambit of MCR 2.403 (O)'s costs.

The Court of Appeals also curiously cited to *McAuley v. General Motors Corp.*<sup>44</sup> as authority for the proposition that appellate fees are recoverable. Indeed, this Court's language in *McAuley* likely serves as the death knell to the new rule announced by the Court of Appeals. In *McAuley*, the Court held that "Although one of the aims of the mediation rule is to discourage needless litigation, the rule is not intended to punish litigants for asserting their right to *a trial on the merits*."<sup>45</sup> Plaintiff argues that

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<sup>42</sup> See Mich. Ct. R. 2.610 (judgment notwithstanding the verdict); Mich. Ct. R. 2.611 (new trial).

<sup>43</sup> See Mich. Ct. R. 2.116.

<sup>44</sup> *McAuley v General Motors Corp.*, 457 Mich. 513; 578 N.W.2d 282 (1998), *overruled in part but not as to the cited proposition in* Rafferty v. Markovitz, 461 Mich. 265; 602 N.W.2d 367 (1999).

<sup>45</sup> *McAuley*, 457 Mich. at 523 (emphasis added).

this Court chose its words wisely. This Court, therefore, could not have been more clear: MCR 2.403 (O) is a device to award costs incurred at the trial level and within the trial court. This Court held that MCR 2.403 (O) should not be viewed as a device to punish litigants for asserting their right to a trial on the merits. A trial on the merits *only* occurs in the trial court. “A party who rejects a mediation evaluation is subject to sanctions if the party fails to improve its position *at trial*.”<sup>46</sup> This Court should reaffirm its position in *McAuley*, and reverse the Court of Appeals.

The holding in the Court of Appeals also affects the interplay with statutes. MCL 600.6306 provides the statutory mechanism that “governs the manner in which the Court is to enter judgment.”<sup>47</sup> The statute reads: “After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court.”<sup>48</sup> Court Rules should be read in harmony with legislative statutes. Thus, the statutory scheme of the legislature assumes that judgments will be entered after the trial. The Court Rules supplement that rule with MCR 2.403 (O) (8), providing that after 28 days after the entry of judgment by the trial court, one must make his request for costs or forfeit the right to costs. Therefore, the interplay of Court Rules and the statutes of the Legislature would apply in an odd and awkward fashion were the Court of Appeals’ decision upheld.

The Court of Appeals correctly held that the purpose of MCR 2.403 is to encourage settlement and to deter protracted litigation.<sup>49</sup> However, the Court of Appeals’ decision could also serve to

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<sup>46</sup> *Put v. FKI Indus.*, 222 Mich. App. 565, 572; 564 N.W.2d 184 (1997) (emphasis added).

<sup>47</sup> *Amlotte v. United States*, 292 F. Supp. 2d 922, 927 (E.D. Mi. 2003).

<sup>48</sup> Mich. Comp. Laws § 600.6306 (1).

<sup>49</sup> *See Warren v. Pickering*, 192 Mich. App. 153, 156; 480 N.W.2d 306 (1991).

protract litigation, by numerous and unnecessary appeals. If one party rejects case evaluation, but the other accepts, the latter party's attorney has every incentive to appeal, knowing that all fees will be paid by his client to the extent the final judgment is more favorable or by the other party to the extent the final judgment is less favorable. Since the Court of Appeals held that "necessitated by" is not causal in any way, the attorney is safe in the knowledge that all of his fees will be paid in pursuing appeals. The number of unnecessary and meritless appeals, therefore, may actually increase. In its zeal to punish those who reject case evaluation, the Court of Appeals neglected to consider that any gain in docket control due to litigants' fear to appeal would be tempered by the temptation for those who accept case evaluation will pursue every appeal they can.

**B. The Supreme Court had no intention to include appellate fees in MCR 2.403(O).**

**1. The Committee which amended MCR 2.403 only included trial judges and practitioners and did not include any members of the appellate bar or the appellate judiciary.**

On September 19, 1994, this Court appointed members to a Mediation Rule Committee, whose responsibilities were to make recommendations on what changes should be made to MCR 2.403. However, not *one* member of the appellate bar was an invitee, nor was any member from the appellate bench invited. Indeed, the Committee was made up entirely of trial judges and practitioners.<sup>50</sup> The 1997 changes, which form the basis of Appellee's entire argument, were based on this Committee's recommendations,<sup>51</sup> yet not one member of that Committee represented appellate interests. It would

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<sup>50</sup> Special Orders, Mediation Rule Committee, MCR 2.403 (O), 451 Mich. 1205

<sup>51</sup> See Mich. Ct. R. 2.403, Staff Comments (1997) ("The March 5, 1997, amendments of MCR 2.403, 2.405, are based on the recommendations of the Mediation Rule Committee appointed by the

be strikingly odd for the Supreme Court to endorse such a sweeping change in 1997, as the Court of Appeals held were made, without any input from the bench and bar whom it would affect most.

Finding no language supporting its construction, The Court of Appeals engaged in its own analysis of statutory construction, ultimately holding that “the ultimate ‘verdict’ for determining sanctions is that after appellate review.”<sup>52</sup> Not only did the Court of Appeals break from clear *stare decisis* interpreting MCR 2.403,<sup>53</sup> but its holding stands at stark odds to the language of this Court’s Committee Notes in drafting the May, 2000 changes:

The amendments of MCR 2.403, 2.404, 2.405, 2.501, 2.502 and 2.503 are mainly to change terminology, replacing “mediation,” as used in current MCR 2.403, with the term “case evaluation.” “Mediation” will be used to describe the facilitative process established in MCR 2.411, *in keeping with the generally accepted usage of the term*.<sup>54</sup>

The Staff Comments, therefore, were clearly meant to retain the *accepted* meaning of the content, procedure, and consequences of mediation, not to make sweeping changes as urged by the Court of Appeals. Further evidence that appellate fees were not meant to be included in the 1997 Amendments is gleaned from Justice Kelly’s dissent in adopting the May, 2000 changes:

Mediation should not become yet another hurdle to a just resolution of disputes. Parties should not feel pressed to settle against their best interests, or involuntarily to expend financial resources in excess of the normal *costs of trial*. Litigation,

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Supreme Court on September 19, 1994.”)

<sup>52</sup> *Haliw v. Sterling Heights*, Mich App No. 237269, p. 5 (2003).

<sup>53</sup> *See supra* I A 3 of this Brief.

<sup>54</sup> Mich. Comp. Laws, § 2.403, Staff Comments (2000) (emphasis added). Staff Comments are, of course, not binding. However, to the extent there is ambiguity in this Court Rule, and to the extent the Court of Appeals is relying solely on its own *intuition* of what it thinks the 1997 Amendments meant, it is not out of place to look toward the Staff Notes.

without the new rules, is already too costly.<sup>55</sup>

Justice Kelly, while disagreeing with her fellow justices, made evident that the majority's adoption of the changes were only contemplated for trial procedures (e.g., jury trials, bench trials, *judgments non obstante veredicto*, directed verdicts, or by motions for summary disposition) — not appellate procedures. If this was her view in 2000, *a fortiori*, it was the case in 1997.

**2. Under the appellate court's holding, the appellate division apparently has no role in assessing costs and attorney fees incurred at the appellate level.**

Further evidencing a lack of intent to change this State's interpretation of MCR 2.403 is the complete lack of involvement of the appellate courts in assessing (indeed, having any input whatsoever) the fees that occur in their own courts. The only court that has jurisdiction to assess attorney fees and costs is the trial court:

If the verdict awards equitable relief, costs may be awarded if the court determines that . . . [it is fair to award costs, which include] a reasonable attorney fee based on a reasonable hourly or daily rate *as determined by the trial judge* for services necessitated by the rejection of the case evaluation.<sup>56</sup>

Further, MCR 2.403 provides “[I]f the ‘verdict’ is the result of a motion as provided by subrule (O) (2) (c), the court may, in the interest of justice, refuse to award actual costs.”<sup>57</sup> There isn't even a mechanism for appellate review. Not only is this procedurally odd, but, to the extent an appellate court retains jurisdiction over the matter and parties after the appeal is resolved, the party seeking

<sup>55</sup> Mich. Comp. Laws, § 2.403, Staff Comments (2000) (Kelly, J., dissenting) (emphasis added).

<sup>56</sup> Mich. Ct. R. 2.403 (O) (5-6) (emphasis added).

<sup>57</sup> Mich. Ct. R. 2.403 (O) (11) (emphasis added). Under the MCR, “Court” means trial court. *See infra* fn. 67.

appellate or trial attorney fees could never even *make* its request to the trial court within 28 days (as required by MCR 2.403(O)(8)). Making the request on the trial court would be jurisdictionally improper, as that court would no longer have jurisdiction over the parties or the subject matter.<sup>58</sup>

MCR 7.213 explicitly provides for an award of appellate attorney fees. Accordingly, the appellate court has jurisdiction to assess attorney fees and other relief if a party does not comply with a provision of Rule 7.213 or the appellate court's pre-argument conference order.<sup>59</sup> The Court of Appeals also specifically has the power to assess reasonable attorney fees if it deems the appeal vexatious or unmeritorious.<sup>60</sup> Pursuant to MCR 7.216 (C), the appellate court has the explicit authority to remand on the issue of actual damages, but, *expressio unius*, calls on only the appellate court to assess attorney fees and punitive damages.<sup>61</sup> Further, the Court of Appeals has general powers to grant additional or further relief it deems just.<sup>62</sup> These Court Rules make clear that the Court Rules explicitly provide the authority to grant appellate attorney fees when they were intended, and MCR 2.403 (O) does not explicitly provide for appellate attorney fees. The appellate courts are in the best position to

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<sup>58</sup> See Mich. Ct. R. 7.208 (A).

<sup>59</sup> See Mich. Ct. R. 7.213 (A) (6). Note the province of jurisdiction is held exclusively within the court of appeals, evidencing an intent of spheres of influence at each level of the judiciary.

<sup>60</sup> See Mich. Ct. R. 7.216 (C).

<sup>61</sup> Cf. *Marshall v. Wabash R. Co.*, 201 Mich. 167, 172; 167 N.W. 19 (1918) ("Under the legal maxim of construction that express mention of one thing implies the exclusion of other similar things, there is reason in the contention that, the act having expressly named certain liens made subordinate, it by implication excludes others not mentioned, upon the presumption that, having designated some, the legislature designated all it was intended the act should include.").

<sup>62</sup> See Mich. Ct. R. 7.216 (A) (7). The language was drafted broad enough to possibly include attorneys' fees.

assess appellate fees, just as the trial courts are in the best position to assess trial fees. Neither level of the judiciary has expertise in assessing fees incurred in the other's imperium, and it seems unlikely that the Supreme Court created such a duty on trial courts in this situation.

**3. The minor changes in the 1997 Amendments to MCR 2.403 were not meant to result in sweeping changes. The Court of Appeals broke with interpretations of previous changes in the Rule, which were also mostly minor.**

If this Court intended to adopt such a sweeping change in the effect of MCR 2.403 (O) in 1997, it clearly broke course with recent amendments, most of which were very minor, mostly procedural, and hardly substantive.<sup>63</sup> It is difficult to believe that this Court intended to break with the traditional interpretation of when and if attorney fees were available, the prior language of the MCR 2.403 (O), and the line of reasoning adopted by, e.g., *American Casualty* and *Giannetti*. All of this was apparently done, most notably, *sub silentio*. The reasoning of the appellate court simply doesn't seem to fit.<sup>64</sup>

**4. MCR 2.403 applies only to civil actions, which originate in the trial court, and not appellate proceedings, as appellate courts do not have jurisdiction over civil actions.**

<sup>63</sup> See, e.g., Mich. Ct. R. 2.403: 1989 Amendments (filing of documents, refunding fees, terminology changes, attorneys charging fees to clients, failing to file acceptance is rejection, entry of judgment, timing of recovery of costs); 1991 Amendments (adding subrule (O)(9), affecting awards to minors or intoxicated persons); 1995 Amendments (Mediation affecting probate proceedings); February, 1997 Amendments (Adjusting verdicts for relative fault); October, 1997 Amendments (removal of cases within the trial courts, timing amendment will take effect); 2000 Amendments (2.403 changes are only to wording/terminology).

<sup>64</sup> Cf. *Zalut v. Andersen & Assoc., Inc.*, 186 Mich. App. 229, 233-234; 463 N.W.2d 236 (1990) ("The change advocated by plaintiffs is a dramatic change and there is nothing in the published history of the rule to indicate that the failure to include the word 'actual' in the last sentence of MCR 2.403(O)(1) was intended to make such a monumental change in the rule. Specifically, neither the staff comments nor the authors' comment in the leading text on the Michigan Court Rules make any reference to the interpretation advocated by plaintiffs.")

Case Evaluation only occurs during and at the trial level, and only the trial court has jurisdiction over civil actions.<sup>65</sup> While all civil actions begin with the filing of a complaint in the trial court, the appellate court only sits to hear certain cases within its jurisdiction, none of which explicitly serve to commence a case. The Court of Appeals has jurisdiction over: appeals of right; appeal by leave; extraordinary writs; other appeals; appeals by state prosecution; and dismissal for want of jurisdiction.<sup>66</sup>

A universe of procedure was created by the Michigan Court Rules. In Michigan, there are three general levels of the judiciary: a level wherein trials are held; a level of appellate review; and one Supreme Court, the final arbiter of the law in this State. In drafting the Rules, this Court created rules of procedure for the trial level.<sup>67</sup> The Rules of civil procedure for virtually all non-equitable, civil actions (certainly like the one at bar) were provided for in Chapter 2. In no other chapter were procedural rights, duties, privileges or obligations relating to the trial level provided for.<sup>68</sup> Consistently, all appellate

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<sup>65</sup> See Mich. Ct. R. 2.101.

<sup>66</sup> See Mich. Ct. R. 7.203 (A). The extraordinary writs of *habeas corpus*, *mandamus*, and *quo warranto* do not involve civil actions. Further, unless specifically authorized by the law of Michigan, i.e., an act of the legislature or the Constitution itself, no action shall originate in the court of appeals. Thus, this Court would not have the authority to alter the subject matter jurisdiction of the judiciary, even if it so chose. See also Mich. Comp. Laws § 600.308.

<sup>67</sup> That MCR 2.001 applies to “all courts” created by the constitution and laws of the State of Michigan do not mean that Chapter 2 applies to proceedings in appellate courts. Only trial courts have jurisdiction over “civil actions,” which begin with the filing of a complaint with a court. See Mich. Ct. R. 2.101 (A-B). Therefore, *expressio unius*, Chapter 2 only has relevance to trial courts. Further, “any civil action” may be submitted to case evaluation by a court. Mich. Ct. R. 2.403 (A) (1). This implies that court must mean trial court, since only case evaluation is done at the trial level.

<sup>68</sup> The Rules governing special proceedings in Chapter 3 are, of their nature, unique and largely not civil matters. The Procedure in Chapter 4 only supplements Chapter 2 and only apply uniquely to district and municipal courts. What is most relevant is that certainly one will find nothing in Chapter 7 of interest to the trial courts and nothing in Chapter 2 of interest to the appellate court.

review (be it from the district court to the circuit court or to the court of appeals or the Supreme Court) was provided for in Chapter 7.<sup>69</sup> As in Chapter 2, in no other chapter were procedural rights, duties, privileges or obligations relating to the appellate level provided for other than in Chapter 7.

This consistency was not by chance. It evidences a clear choice by this Court in adopting rules of procedure in Michigan courts: each level of the judiciary is separate, with defined levels of its jurisdiction and power.<sup>70</sup> It would make little sense to provide for appellate fees that incidentally (and hardly foreseeably) result from a rejection of case evaluation in a purely trial court-related mechanism like Case Evaluation. “The purpose of the mediation rule is to expedite and simplify the final settlement of cases.”<sup>71</sup> Courts of Michigan, for good reason, have only interpreted this to mean cases at the trial level.<sup>72</sup> Case Evaluation, therefore, has always existed to encourage settlement to avoid the expense and cost of a trial on the merits.<sup>73</sup>

The appellate courts already have devices to encourage settlement of cases, e.g., pre-argument

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<sup>69</sup> See generally DEAN AND LONGHOFFER, MICHIGAN COURT RULES PRACTICE, § 2403.22, p. 534.

<sup>70</sup> See Mich. Ct. R. 1.103 (“Rules stated to be applicable only in a specific court or only to a specific type of proceeding apply only to that court or to that type of proceeding and control over general rules.”)

<sup>71</sup> *Smith v. Elenges*, 156 Mich. App. 260, 263; 401 N.W.2d 342 (1986).

<sup>72</sup> See *supra* I A 3 of this Brief.

<sup>73</sup> See *Smith v. Elenges*, 156 Mich App. at 263 (“The policy underlying this rule is to place the burden of litigation costs upon the party who *insists upon a trial* by rejecting a proposed mediation award. Thus, the rules are designed to favor settlements before *a trial has been held*, and to relieve parties, who are willing to settle for a fair amount, of *the burden of a trial*.”) (emphasis added).

conferences.<sup>74</sup> “The Conference shall consider *the possibility of settlement*, the simplification of issues, and any other matters which the mediator determines may aid in the handling of or the disposition of the appeal.”<sup>75</sup> This, of course, evidences the intent of this Court that it drafted rules which apply to each level of the judiciary’s jurisdiction, but are only applicable to each level’s jurisdiction. This Rule also provides for attorneys’ fees in the event a party fails to comply with the Rule. Most notably, applying Chapter 2 costs and case evaluation sanctions to matters jurisdictionally belonging in Chapter 7 would appear to violate MCR 2.001 on its face:

“The rules in this chapter govern procedure in all civil proceedings in all courts established by the constitution and laws of the State of Michigan, except where the *limited jurisdiction of a court* makes a rule *inherently inapplicable* or where a *rule applicable to a specific court* or a specific proceeding *provides a different procedure*.” (Emphasis added).

Certainly, were a Court of Appeals case to go to the Supreme Court, the Court would not look to 7.213 to assess attorneys’ fees; it would look to the Rules that pertain to the Supreme Court’s jurisdiction, notably MCR 7.318 (B). As a matter of pure intent in drafting the Rules as it did, this Court would not have provided for appellate fees in Chapter 2 *ab initio*, and it certainly wouldn’t have provided for appellate fees in a tortured reading of a 1997 Amendment to a Chapter 2 provision. Plaintiff urges this Court to therefore reverse the Court of Appeals’ decision and affirm the Trial Court’s judgment of fees to be recovered as a case evaluation sanction under MCR 2.403 (O).

## **II IMPOSING APPELLATE FEES AS A PUNITIVE SANCTION FOR REJECTING CASE EVALUATION WILL CREATE A CHILLING EFFECT ON FUTURE LITIGANTS, SEVERELY DETERRING THE EXERCISE OF**

<sup>74</sup> See Mich. Ct. R. 7.213 (A) (emphasis added).

<sup>75</sup> See Mich. Ct. R. 7.213 (A) (1).

## THEIR STATUTORY RIGHT TO APPEAL

Appellate review is indispensable to any democracy. The appellate division exists to correct errors of law and injustice by a lower tribunal. Just as our three branches of government check each other's powers and abuses, the judicial branch checks itself through appellate review, with the seminal goals of preserving rights and righting wrongs as its compass and guide.

Requiring a litigant to brave the sword of his adversary's *appellate* fees would create a most undesirable chilling effect. With the prospect of not only paying his own attorneys' trial and appellate fees, but also having to pay his adversary's trial and appellate fees would impose this Hobson's Choice for the litigant: Either accept a case evaluation award one may deem grossly unfair or stare down the barrel of potential bankruptcy in having to pay the other side's appellate fees. The prospect of exposure to the opposing party's appellate fees will have a chilling effect on the protection of the fundamental right to appeal.

No situation better evidences this Hobson's Choice than the case of Plaintiff, Valeria Haliw. She relied on years of caselaw interpreting the natural accumulation doctrine and decided not to accept a case evaluation award she and her attorneys deemed was not fair in light of her injuries. She also relied on a decision of the trial judge, who denied the City of Sterling Heights' Motion for Summary Disposition. Given the caselaw, the low award, and armed with the confidence that the Trial Judge believed she had stated a claim upon which relief could be granted, Plaintiff rejected the award and thought trial was a better option.

Little did she know that the Supreme Court of this State, which grants leave to hear about 100 cases out of the 2000 motions for leave to appeal it receives per year (mostly from only the Court of

Appeals), would reverse a well-established, albeit incorrect, principle of law in this State. Now, the City argues that this woman should pay for all of its attorney fees (and, presumably, all fees incurred thereafter if this Court renders an unfavorable decision). Despite the fact that the City desperately wanted the Supreme Court to take the initial appeal and despite the fact that the City reaped a great benefit from that decision (and every other case in the future), the City urges this Court to hold that she should have to pay its appellate fees. Plaintiff had the rug pulled out from underneath her, and the now City wants to reap a windfall by having her pay for the cost of the appeal process.

The finances and situation of Plaintiff illustrate the harshness of the Court of Appeals' new rule of law. This is an elderly woman over 75 years old. Her only means of support are social security and a small pension. She was severely injured through no fault of her own allegedly by the City of Sterling Heights. She lives her days with a steel plate and screws in her body as a result of the fall, saying nothing of the memories of that awful day and the remediation thereafter. She had what she thought, her attorneys confirmed, the trial court held, and the Court of Appeals affirmed was a legal claim upon which relief could be granted. However, due to the change in the law with respect to the application of the natural accumulation doctrine, she will not be compensated for these injuries. To further add salt to her wounds, the City of Sterling Heights is demanding that this woman pay in excess of \$30,000 for its appellate fees.

The story of Plaintiff is a tragic one. Unfortunately, if the new rule of law announced by majority in the Court of Appeals is affirmed, the story of Plaintiff may be told again — but with different players, some perhaps with stories and consequences even worse than that of the Plaintiff herein. At a minimum, the Court of Appeals' decision, if upheld, should be applied prospectively. "The head is not more native

to the heart.”<sup>76</sup>

The 2-1 decision of the Court of Appeals simply tips the scales too far in favor of settlement. Indeed, reading the opinion of the Court of Appeals, one would get the impression that the scale of settling cases is a linear one, i.e., the more settlement the better. Plaintiff respectfully disagrees with the Court of Appeals’ decision because it deviated from the decisions of several prior panels and the express language of the Court Rules. Our democracy strives for balance, balance in equity and balance in law. Our courts strive for a balance as well as it relates to appellate review. There should not (and need not) be full appellate review of *every* case. However, there are situations which require review by a higher tribunal, a second set of eyes, one who sits to rectify wrongs.

The State of Michigan had this balance until the Court of Appeals Panel rendered its 2-1 decision. There was just enough risk involved to settle, but there was just enough incentive not to.<sup>77</sup> Prior to the Court of Appeals’ decision, litigants, in reviewing their case evaluation award, knew where they stood and what the consequences were of rejecting. Now, unless they are certain they will get a number similar or higher than a three attorney panel award, they will be forced to fold or settle because the ante is too high. The appellate division’s docket may shrink, but at the expense of the foundation and purpose of the judicial branch, a pyrrhic victory indeed. Fewer injustices will be righted. More

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<sup>76</sup> WILLIAM SHAKESPEARE, *HAMLET*, Act 1, Scene 2.

<sup>77</sup> See Ayre, 256 Mich. App. at 525 (“This rule protects a party’s right to reject, but also *fairly* burdens that decision with enough risk to ensure that it is well reasoned.”) (emphasis in original).

laws will be interpreted incorrectly. Equity will be a slave to docket control efficiency.<sup>78</sup> The irony is that had the parties accepted the case evaluation award, the prior interpretation of how and when the natural accumulation doctrine applies would *still* be good law in this State. This Court would not have had the opportunity to correct what it considered the misapplication of the doctrine to be in the lower courts. The case of *Haliw v. Sterling Heights* is the reason why we have appellate review in the first place.

This could not have been the intention of this Honorable Court in drafting MCR 2.403 (O) and the amendments that followed. Yet, if two Judges in the Court of Appeals have it their way, that will be its import. For the sake of the judiciary's role in our democracy, the decision below must be reversed.

### **CONCLUSION AND RELIEF REQUESTED**

The decision of the Court of Appeals should be reversed. Plaintiffs-Appellants request that this Court hold that appellate attorney fees are not recoverable under MCR 2.403 (O). Plaintiffs-Appellants further request that this Court hold that only fees incurred at the trial level that were necessitated by rejection of case evaluation is an appropriate sanction.

Respectfully Submitted,

HALIW SICILIANO AND MYCHALOWYCH PLC

By: 

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<sup>78</sup> See Mich. Ct. R. § 2.403, Staff Comments (Kelly, J., dissenting) (“I am concerned that, in some heavily burdened courts, judges may use the new rules, not as an option for the parties, but as a docket control mechanism for the court.”)

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